

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Newark, NJ, Employer**

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**Docket No. 08-2136  
Issued: May 6, 2009**

*Appearances:*

*James D. Muirhead, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 30, 2008 appellant filed a timely appeal from the March 20 and July 30, 2008 merit decisions of the Office of Workers' Compensation Programs denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained injuries to his head, neck, buttocks and shoulders while in the performance of duty on April 4, 2006.

**FACTUAL HISTORY**

On February 15, 2007 appellant, a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that he sustained injuries to his head, neck, buttocks and shoulders on April 4, 2006, when the vehicle he was driving was struck by another vehicle in the employing establishment parking lot while exiting a parking space. The employing

establishment controverted the claim, contending that he was not injured in the alleged incident, as evidenced by the fact that he waited 10 months to file his claim.

In a letter dated March 13, 2007, the Office informed appellant that the information submitted was insufficient to establish his claim and allowed him 30 days to submit additional information, including a detailed account of the alleged injury and a physician's report, with a diagnosis and a rationalized opinion as to the cause of the diagnosed condition.

Appellant submitted notes and reports from Dr. David Romano, a Board-certified internist, for the period April 26 through November 13, 2006. On April 26, 2006 Dr. Romano stated that appellant had been experiencing back pain for weeks, after being involved in a motor vehicle accident in a parking lot at work. He indicated that appellant's pain was worsening. On August 31, 2006, referencing the April 4, 2006 motor vehicle accident in the employing establishment parking lot, Dr. Romano related that appellant was out of work from May 19 through 30, 2006 due to back pain.

Appellant provided notes from Dr. David Rojer, a Board-certified orthopedic surgeon. On June 26, 2006 Dr. Rojer stated that appellant complained of neck and back pain, which started in April 2006, when someone backed into his vehicle in a parking lot at work. He indicated that appellant's pain was worsening. Dr. Rojer noted that he had diffuse tenderness over the lumbosacral spine and pain over the sternocleidomastoid and trapezius muscles. Radiographs of the cervical spine showed significant narrowing and osteophytes at the C5-6 level. Radiographs of the lumbosacral spine showed reasonable preservation of disc height without obvious fracture, dislocation or bony abnormalities. On July 26, 2006 Dr. Rojer reported appellant's continuing neck and back pain, noting that he was stiff and had minimal antalgia. In an August 17, 2006 disability slip, he diagnosed sprain of the lumbosacral and cervical spine.

Appellant was also treated by Dr. Jordan Fersel, a Board-certified anesthesiologist. On September 19, 2006 Dr. Fersel stated that appellant was involved in a motor vehicle accident on April 4, 2006 when his vehicle was struck by another vehicle in the employing establishment parking lot. Appellant informed Dr. Fersel that he did not seek medical treatment on the date of the incident because, although he was dizzy, he did not experience pain immediately following the accident. Rather, pain developed slowly, radiating to his right lower extremity, and in his neck, radiating into his shoulders. Dr. Fersel's examination revealed decreased range of motion of the cervical spine for right lateral rotation, flexion and extension, and decreased range of motion of the lumbar spine for flexion, extension and right lateral rotation. He found decreased sensation in the right and left lower extremities and decreased sensation in the right lateral upper extremity. Deep tendon reflexes were decreased throughout the lower extremities, and there were cervical and lumbar paraspinous muscle spasms. Dr. Fersel diagnosed cervical degenerative disc disease with protrusions at C3-4; cervical radiculopathy; lumbar bulging discs at the L4-5 level; and lumbar radiculopathy. The record contains numerous follow-up reports for the period October 10, 2006 through January 16, 2007 reflecting appellant's continuing complaints of neck and back pain. In an October 19, 2006 disability slip, Dr. Fersel diagnosed sprain/strain of the back and neck.

In an undated statement, appellant indicated that his neck and back injuries sustained in the April 4, 2006 motor vehicle accident were disabling. He stated that he failed to file a report

within 30 days because his supervisor informed him that the incident was not work related. However, appellant alleged that he reported the accident to his supervisor immediately.

The record contains an accident report dated April 12, 2006, reflecting that on April 4, 2006 appellant's vehicle was hit on the driver's side, by another vehicle, in the employing establishment parking lot. The report reflects that, immediately following the incident, appellant complained of feeling stiff in his buttocks and hips, spasms, and pain in his neck and lower and upper back.

By decision dated March 17, 2007, the Office denied appellant's claim. Accepting that the work incident occurred as alleged, the Office found that the medical evidence did not contain a diagnosis that could be connected to the accepted event and, therefore, was insufficient to establish that he had sustained an injury under the Federal Employees' Compensation Act on April 4, 2006.

On May 15, 2007 appellant requested an oral hearing, which was held on December 18, 2007. He testified that he had not pursued his claim immediately following the April 4, 2006 accident because his supervisor told him that it was "not a postal issue." Appellant explained that he had experienced difficulty obtaining medical reports due to the fees involved. He reiterated his claim that he was unable to work due to neck, back and shoulder injuries sustained in the April 4, 2006 accident.

By decision dated March 20, 2008, the hearing representative affirmed the Office's April 17, 2007 decision. The representative found that appellant had established that the April 4, 2006 motor vehicle accident had occurred, but that the medical evidence was insufficient to establish a causal relationship between the accepted work incident and a diagnosed condition.

On April 11, 2008 appellant, through his representative, requested reconsideration. By decision dated June 6, 2008, the Office denied appellant's request for reconsideration, finding that he had not raised a substantive legal question or submitted evidence sufficient to warrant merit review.

On June 26, 2008 appellant, through his representative, again requested reconsideration. In support of his request, appellant submitted a June 20, 2008 narrative report from Dr. Fersel, who stated that he had been treating appellant since his April 4, 2006 motor vehicle accident, when a coworker struck his car in the employing establishment parking lot. Dr. Fersel noted that appellant had no neck or back pain at the time of the accident. He indicated that, "although there may have been underlying arthritic conditions prior to the motor vehicle accident, these were not manifest in any fashion until after the accident, due to their exacerbation by the forces of the motor vehicle accident." Dr. Fersel stated, "Therefore, it is my opinion that the pain and discomfort were precipitated by the motor vehicle accident of April 4, 2006 and that the preexisting arthritis was permanently aggravated."

By decision dated July 30, 2008, the Office denied modification of its previous decisions, finding that there was no rationalized medical evidence explaining how the accepted April 4, 2006 motor vehicle incident caused a diagnosed condition.

## **LEGAL PRECEDENT**

An employee seeking benefits under the Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>3</sup>

To determine if an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury.<sup>4</sup>

An award of compensation may not be based on appellant’s belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.<sup>5</sup>

## **ANALYSIS**

The Board finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty.

An employee who claims benefits under the Act has the burden of establishing the essential elements of his claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.<sup>6</sup> However, it is well established that proceedings under the Act are not adversarial in nature, and

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>3</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>4</sup> *Thomas L. Agee*, 56 ECAB 465 (2005).

<sup>5</sup> *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

<sup>6</sup> See *Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); see also *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>7</sup>

The Office accepted that the April 4, 2006 motor vehicle accident occurred as alleged, but found that the medical evidence did not contain a rationalized opinion establishing a causal relationship between the accepted event and a diagnosed condition. The Board finds, however, that the medical evidence of record supports that appellant sustained a work-related injury on April 4, 2006.

Dr. Fersel opined that the April 4, 2006 accident was the proximate cause of appellant's back condition. On September 19, 2006 he described the accident, in which appellant's vehicle was struck by another in the employing establishment parking lot. Dr. Fersel noted that appellant did not seek medical treatment on the date of the incident because, although he was dizzy, he did not experience pain immediately following the accident. Rather, pain developed slowly, radiating to his right lower extremity, and in his neck, radiating into his shoulders. Dr. Fersel's examination revealed decreased range of motion of the cervical spine for right lateral rotation, flexion and extension, and decreased range of motion of the lumbar spine for flexion, extension and right lateral rotation. He found decreased sensation in the right and left lower extremities and decreased sensation in the right lateral upper extremity. Deep tendon reflexes were decreased throughout the lower extremities, and there were cervical and lumbar paraspinous muscle spasms. Dr. Fersel diagnosed cervical degenerative disc disease with protrusions at C3-4; cervical radiculopathy; lumbar bulging discs at the L4-5 level; and lumbar radiculopathy. The record contains numerous follow-up reports for the period October 10, 2006 through January 16, 2007 reflecting appellant's continuing complaints of neck and back pain. In an October 19, 2006 disability slip, Dr. Fersel diagnosed sprain/strain of the back and neck. On June 20, 2008 he stated that he had been treating appellant since his April 4, 2006 motor vehicle accident. Dr. Fersel indicated that, "although there may have been underlying arthritic conditions prior to the motor vehicle accident, these were not manifest in any fashion until after the accident, due to their exacerbation by the forces of the motor vehicle accident." He opined that appellant's pain and discomfort were precipitated by the April 4, 2006 motor vehicle accident, and that his preexisting arthritis was permanently aggravated. While Dr. Fersel's reports do not explain the physiological process whereby the motor vehicle accident aggravated appellant's arthritis, or caused a sprain or strain of the back or neck, they display a thorough knowledge of the factual and medical background, and are consistent in indicating that appellant's diagnosed conditions were caused by the impact of the April 4, 2006 incident.

The remaining medical evidence of record also supports appellant's claim. On April 26, 2006 Dr. Romano stated that appellant had been experiencing back pain for weeks, after being involved in a motor vehicle accident in a parking lot at work, and that his pain was worsening. On August 31, 2006, referencing the April 4, 2006 motor vehicle accident in the employing establishment parking lot, he related that appellant was out of work from May 19 through 30, 2006 due to back pain. On June 26, 2006 Dr. Rojer stated that appellant began experiencing neck and back pain in April, when someone backed into his vehicle in a parking lot at work. He

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<sup>7</sup> *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, *supra* note 6; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

noted that appellant had diffuse tenderness over the lumbosacral spine and pain over the sternocleidomastoid and trapezius muscles. Radiographs of the cervical spine showed significant narrowing and osteophytes at the C5-6 level. Radiographs of the lumbosacral spine showed reasonable preservation of disc height without obvious fracture, dislocation, or bony abnormalities. On July 26, 2006 Dr. Rojer reported appellant's continuing neck and back pain, noting that he was stiff and had minimal antalgia. In an August 17, 2006 disability slip, he diagnosed sprain of the lumbosacral and cervical spine. While reports from Dr. Rojer and Dr. Romano do not contain a definitive opinion as to the cause of appellant's condition, their reports confirm that appellant continued to be treated for his cervical and lumbar conditions, which reportedly began on the date of the accepted work incident.

The Board notes that, while none of the reports of appellant's attending physicians is completely rationalized, they are consistent in indicating that he sustained an employment-related injury and are not contradicted by any medical or factual evidence of record. While the reports are not sufficient to meet appellant's burden of proof to establish his claim, they raise an uncontroverted inference between his claimed condition and the accepted employment injury, and are sufficient to require the Office to further develop the medical evidence and the case record.<sup>8</sup> On remand the Office shall obtain a rationalized opinion from a qualified physician as to whether appellant's current condition is causally related to the accepted incident, and shall issue an appropriate decision in order to protect his rights of appeal.

### **CONCLUSION**

The Board finds that this case is not in posture for decision as to whether or not appellant sustained an injury in the performance of duty.

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<sup>8</sup> See *Virginia Richard*, *supra* note 6; see also *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30 and March 20, 2008 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further development consistent with this decision.

Issued: May 6, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board